case, including the question whether other accommodation is available for the owner or the tenant, greater hardship would be caused by granting an order or judgment than by refusing to grant it:

Provided further that in the case of a controlled premises being used by the tenant for business, trade or professional purposes an order or judgment shall not be made or given on any grounds specified in this paragraph unless the court is satisfied that the owner requires them for the purpose of carrying on his own business, trade or profession;"

The statement of claim shows that instead of section 16(1)(f) the plaintiffs had prayed for an order under section 16(1)(j) which relates to the receipt of excess rent from subtenants. As was pointed out by Mr. Atma Singh Gill for the plaintiffs this was clearly a typing error. The pleadings as well as the evidence adduced in the case on this particular point related to section 16(1)(f) and not section 16(1)(j). Here again the defendants were in no way misled or prejudiced as they had averred fully in their statement of defence on section 16(1)(f) and the evidence and submissions all centred around the same sub-section.

So on the third part of Mr. Rajasingam's submission I would say that there was sufficient evidence adduced by the plaintiffs that the premises were reasonably required by them for their own occupation, that the tenancy had been lawfully determined by not less than one year's notice to quit and that there had been no change by purchase in the ownership of the premises within one year next preceding the date of the notice. Under the first proviso in section 16(1)(f) of the Control of Rent Act the onus was on the defendants to satisfy the court that having regard to all the circumstances of the case, including the question whether other accommodation was available for the plaintiffs or the defendants, greater hardship would be caused by granting an order for the recovery of the premises than by refusing to grant the order. The learned Magistrate made no specific finding on the first proviso but merely said that the question of greater hardship or alternative accommodation did not arise in this case because the defendants were no longer in occupation of the premises. The inference which one may draw from this statement is that the learned Magistrate found no evidence in favour of the plaintiffs in discharging the onus which was on them under the first proviso. For my part I would say that there was insufficient evidence to satisfy the court that the defendants would suffer greater hardship if judgment for possession of the premises was entered against them than by refusing it.

It is true that the plaintiffs owned another premises No. 71 which were let out to a tenant and which they could take over for their own use although there was evidence that there were several subtenants in these premises No. 71 and it was not going to be easy for the plaintiffs to recover the premises. Against this however there was the evidence of DW1 that besides Seremban the defendants could do printing work in Ipoh because their Ipoh office was not fully occupied. The reason they gave for wanting to do their printing work in Seremban rather than in Ipoh was that it would be more economical to operate in Seremban because of the distance involved. It is difficult to appreciate the logic of this reason bearing in mind that their head office itself was in Ipoh having ready facilities for printing work to be done there. On the other hand the defendants would encounter some difficulty in getting started in Seremban. They would first of all have to get the approval of the Machinery Department and the Town Council before starting any printing work. And in addition they would have to get the approval of the plaintiffs as landlords of the premises. Also it is significant to note that even as the hearing was going on in this case in the lower court the defendants were giving up their tenancy of premises No. 8 Medan Pasar in Kuala Lumpur in February 1977 for which they received a compensation of $125,000. They could well have kept these premises to expand their business without having to worry about any distance involved.

Under the second proviso in section 16(1)(f) of the Control of Rent Act the onus was on the plaintiffs to satisfy the court that they required the premises for the purpose of carrying on their own business. This had been amply proved. Their shop at No. 70 was getting overcrowded with goods and they required premises No. 69 for the purpose of expanding their business.

On the last point regarding the doctrine of estoppel I again agree with the learned Magistrate that there was insufficient evidence to bring this doctrine into operation in favour of the defendants. There was no evidence to reach any conclusion that the plaintiffs had led the defendants into the belief or expectation that upon their expending money on the renovations to the premises they could remain there for as long as they liked or for a considerable length of time In fact they had continued to occupy the premises for about three years after the renovations were done and would have continued to do so if not for the cessation of their business. Apart from a somewhat uncertain intention on their part to start their business again the defendants had done nothing even until now — about seven years after closing shop — to show that they were about to carry out their intention.

In the circumstances I am of the view that there are no merits in this appeal and I accordingly dismiss it with costs.

*Appeal dismissed.*

Solicitors: *Lewis & Co.; Gill & Tang.*

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## LEISURE & ALLIED INDUSTRIES PTY. LTD. v. UDARIA SDN. BHD.

**[O.C.J. (Salleh Abas F.J.) April 4, 1979]**

**[Kuala Lumpur — Civil Suit No. 1266 of 1975]**

*Practice and Procedure — Application for judgment — Affidavits in support — Application to cross-examine witnesses — Discretion of the court — R.S.C. O. 32 r. 6.*

In this case the plaintiff claimed the sum of $9,688.28 which he alleged he incurred in connection with the temporary untraceability of a certain equipment. He applied for judgment under Order 32 Rule 6 on the ground of an admission made by the defendant's solicitor. The application was supported by affidavits sworn by witnesses. The defendant challenged the truth of the affidavits and applied to have the defendants cross-examined.

**Held:** there was just cause in this case for requiring the defendants to be cross-examined and in the exercise of its dis-

cretion, the court would allow the application to cross-examine on the affidavits.

*Cases referred to:-*

(1) *Re Lucas* [1952] 1 All E.R. 102.
(2) *Strauss* v. *Goldschmidt* 8 S.L.R. 239.
(3) *Allen* v. *Allen* [1894] P. 239.

CIVIL SUIT.

*Marina Yusof* for the applicant/defendant.

*K. Anantham* for the respondent/plaintiff.

*Cur. Adv. Vult.*

**Salleh Abas F.J.:** This is an appeal against my decision allowing the application by the respondent to cross-examine two witnesses of the appellant/plaintiff in Civil Suit No. 1266 of 1975. The two witnesses concerned are Mr. Malcolm D. Steinberg of 34, Windara Drive, City Beach, West Australia, and Mr. Chen Kah Leng of Messrs Skrine & Company, Straits Trading Building, No. 4, Leboh Pasar Pesar, Kuala Lumpur. These two witnesses swore affidavits on June 27, 1978, and July 5, 1978, respectively. These affidavits were filed in support of the appellant's application under Order 32 Rule 6 for judgment against the respondent "upon admission contained in the letter dated October 25, 1975."

The appellant by its application is seeking to obtain judgment to secure a reimbursement from the respondent of a sum of $9,688.28 which the appellant incurred in connection with the temporary untraceability of a certain equipment, i.e. container No. 277193. The ground of the application is the admission made by the respondent's solicitor in a letter dated October 25, 1975. The hearing of the appellant's application was postponed twice.

In the meantime, the respondent applied by Summons-in-Chambers under Order 38 Rule 1 to cross-examine the two witnesses concerned, or their affidavits should not be used at the hearing of the appellant's application for judgment under Order 32 Rule 6, and I had the misfortune to hear the respondent's application. Counsel for the respondent urged me to grant the application because the cross-examination would relate to the question how the respondent would or would not be liable for the loss or untraceability of the container hired by the appellant in an agreement with a third party and for which the respondent was not liable. The respondent's application was also supported by the affidavit of the respondent's office manager who swore it on November 11 and December 15, 1978, challenging the truth of the affidavits of Mr. Malcolm D. Steinberg and Mr. Chen Kah Leng. On the other hand, counsel for the appellant in opposing the application directed my attention to the respondent's admission through its counsel of its responsibility for the loss in a letter dated October 15, 1975, although the letter was clearly marked "without prejudice."

To allow or not to allow the respondent's application to cross-examine the appellant's witnesses upon their affidavits, I take it, is a matter of court's discretion. In appropriate circumstances, there is no reason why such application should be refused merely because the deponent is a foreigner living outside the jurisdiction (*Re Lucas*[1]); "otherwise foreigners would have an advantage" (*Strauss* v. *Goldschmidt*[2]). It is really a matter of common sense and an elementary legal principle that a party who swears an affidavit much be prepared to stand up to it by cross-examination unless the application to cross-examine him is without just cause vexatious or motivated by desire to delay the proceedings (*Allen* v. *Allen*[3]). In view of the appellant's application for judgment under Order 32 Rule 6, I am not, however, prepared to hold the respondent's application to cross-examine the appellant's witnesses as being without just cause or motivated by desire to delay the proceedings or without *bona fide* or sham or vexatious.

I am not dealing with the merits of the appellant's application for judgment under Order 32 Rule 6, but in order to enable me to exercise my discretion as regards the respondent's application to cross-examine the appellant's witnesses, it is necessary for me to see how the proposed cross-examination would be relevant to the issue in the appellant's application. An examination of this issue is therefore essential. This issue itself could not be properly understood without a reference to the civil suit which the appellant commenced against the respondent. I therefore propose to narrate the facts as follows.

On July 28, 1975, in connection with the supply of certain goods and equipment and their installation, the appellant commenced a civil suit (C.S. 1266/75) against the respondent for the recovery of a principal sum of $63,077.75 and interest of $41,243.88. The respondent having entered appearance by its Statement of Defence filed on August 25, 1975, denied liability. On September 18, 1975, the appellant filed a Notice of Discontinuance abandoning its claim of interest of $41,243.88, thereby making the suit restricted to its claim of the principal sum of $63,077.75 only. The suit remained suspended since that date until July 6, 1978 when the appellant made an application under Order 32 Rule 6 for judgment against the respondent for a sum of $9,688.28, "upon admission contained in the letter dated October 25, 1975." In support of this application for judgment, the appellant filed the affidavits of the aforesaid two witnesses, whilst the respondent in opposing the application filed the affidavits of its office manager, Encik Saharil bin Sulong Manja, sworn on November 11, 1978; challenging the truth of the affidavits of the appellant's witnesses. It is thus in these circumstances of conflict of affidavit evidence that the respondent made an application to cross-examine the appellant's witnesses.

The letter dated October 25, 1975, in which the respondent is said to have made an admission is appended as MDS 9 to Mr. Malcolm D. Steinberg's affidavits. It appears that after the respondent had filed a statement of defence denying liability, a meeting was held on October 24, 1975 between the appellant and the respondent. The following day (October 25, 1975) the appellant's solicitor wrote a letter marked "without prejudice" stating out the items which had been agreed to between the parties at the meeting and asking the respondent's solicitor to confirm the contents of the letter. Such confirmation was duly made by the respondent's solicitor. The relevant portion of the "without prejudice" letter upon which the appellant based its application for judgment under Order 32 Rule 6 is at paragraph 1 as follows:—

"1. *CONTAINER RENTAL CHARGES*

It was agreed that your clients would sort out with K.C. Dat, their forwarding agent, as to the whereabouts of the Container and to produce the relevant receipt for the return of the Container. If the Container had not been returned, it was agreed that your clients would be responsible for paying all charges of the Container Company, Container Transport International Inc. of Australia. It was also agreed that you would write to us within a week to clarify what the exact situation is."

This "without prejudice" admission relates to the temporary untraceability of Container No. 277193 which was rented by the appellant from its owner, Container Leasing Corporation, and was used to convey the goods and equipments (the subject matter of the Civil Suit) supplied to the respondent. According to the Affidavits of Mr. Malcolm D. Steinberg, as the Container was not returned to the owner or its agent, Kontena National Sdn. Bhd., or off-hired, the appellant incurred a rental expenses of US$2,272.50 and off-hiring expenses of M$5,356.28, thereby making a total of M$9,688.28. The container was off-hired by the appellant on August 3, 1977. Until that date the container was lying at the Yard of Port Klang Authority. Based on the above admission the appellant thus claimed reimbursement of the expenses incurred by it by its application for judgment under Order 32 Rule 6. The issue in respect of the appellant's application therefore relates to the respondent's liability or non-liability for the loss or untraceability of the container for which the appellant had incurred certain expenses. This issue was not raised by the appellant in his statement of claim when he commenced the suit against the respondent, although in paragraph 10 there was a claim of Australian $449.02 by way of container hire due to delay in its return to its owner because of defendant's failure to prepare the site for installation of the equipment.

In view of the issue involved in the appellant's application and the fact that the affidavits of the appellant's witnesses were challenged by the affidavit of the respondent's witness, and the purpose of the respondent's application to cross-examine the appellant's witnesses would be directed towards ascertaining the respondent's liability or otherwise, I feel that the proper way to exercise my discretion in this summons is to allow the respondent's application. Hence I ordered accordingly.

*Order accordingly.*

Solicitors: *Marina Yusoff & Co.; Skrine & Co.*

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## ADELINE LOO SOO CHAI v. MAURICE ENG CHUAN GAN

**[O.C.J. (Salleh Abas F.J.) April 6, 1979]**

**[Kuala Lumpur — Civil Suit No. 1116 of 1978]**

*Practice and Procedure — Application to sign final judgment — Separation Deed — Non-payment of monthly allowance — Alleged breach of separation deed — Alleged resumption of cohabitation — Substantial defence — Triable issues — R.S.C. 1957, O. 14.*

*Family Law — Deed of separation — Failure to pay monthly allowances to wife — Alleged breach of separation deed by wife.*

In this case the parties who are husband and wife had entered into a deed of separation, under which the husband undertook to pay a monthly allowance of $1,500 and to provide the wife with a car and the wife undertook to look after the children. At first the wife lived with the children at the matrimonial home and the monthly allowance was duly paid. Subsequently the wife moved out of the house and lived apart from the children and thereafter the husband did not pay the monthly allowance. The wife claimed the sums due for the monthly allowance. The husband alleged that the wife was in breach of the deed of separation as she had left the children to live in the house with him. He also alleged that there had been cohabitation between the parties and also that the wife had contrary to the deed of separation pledged his credit. The wife applied for leave to sign final judgment.

**Held:** there were triable issues in this case and the application must be dismissed.

CIVIL SUIT.

*C. Vijayakumar* for the plaintiff.

*C.T. Khaw* for the defendant.

*Cur. Adv. Vult.*

**Salleh Abas F.J.:** This is an appeal against my decision refusing the application by the appellant/plaintiff to sign a final judgment against the respondent/defendant under Order 14 Rule 1.

The appellant and the respondent are wife and husband, respectively, having been married since December 19, 1963. There were two children of the marriage, namely, Amy Gan Bee Lee, a daughter born in 1964, and Gan Seng Kuan born in 1966. Because of the differences betwen them, the parties entered into a deed of separation on September 1975, in which each of them undertook to perform certain obligations. Before the signing of the deed, the appellant was already living separately from the respondent at No. 15CX Falee Flats, Circular Road, Kuala Lumpur. After the deed was signed, in accordance with the deed she moved to stay with the children at No. 358B, Lorong 10B, United Garden, Kuala Lumpur, whilst the respondent was then away in Singapore, coming home only to this address during the weekends. The appellant stayed at this address with the children for a period of eight months beginning in September 1975 and ending in April 1976, and thereafter she went to live separately and away from the children at No. 38, Jalan Taman Seputeh. She did this because, according to her, the respondent came to live permanently at the United Garden home with the children and as she could not get along with the defendant she moved out. At the time when the appellant was living at the United Garden home, the respondent honoured the deed of separation by paying her a monthly sum of $1,500 for the children's maintenance and herself, and giving her for her use a car as required by Clause 1(b) and (c) of the deed. After she had moved out from the United Garden home to live at No. 38, Jalan Taman Seputeh, the respondent failed to pay her the monthly allowance of $1,500 and to provide her with the car.

Alleging that the respondent was in breach of the deed, the appellant sued him for the recovery of a total sum of $52,554.65, being the amount representing —

(a) the amount of children's maintenance at $1,500 per month for two years beginning April, 1976, to April, 1978; and

(b) the amount expended by her for purchasing and maintaining a car which, according to her, she